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U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE NO. 02-52801
)	
TAMMY A. GAGLIONE,)	CHAPTER 7
)	
DEBTOR(S))	ADV. PRO. 02-5295
)	
HAROLD A. CORZIN, Trustee,)	JUDGE MARILYN SHEA-STONUM
)	
PLAINTIFF)	ORDER GRANTING TRUSTEE'S
)	MOTION FOR SUMMARY
vs.)	JUDGMENT
)	
TAMMY A. GAGLIONE, <i>et al.</i>)	

This matter came before the Court on the Motion for Summary Judgment, filed on October 14, 2003, by Harold A. Corzin, the chapter 7 trustee (the "Trustee"), the Stipulations, also filed on October 14, 2003, the Response of Stephen Gaglione, former husband of the Debtor, Tammy A. Gaglione (the "Defendant"), filed on December 8, 2003, and the Trustee's Reply, filed on December 11, 2003. The Motion for Summary Judgment was abated by the Court until February 17, 2004 so that Third Federal Savings

and Loan Association of Cleveland ("Third Federal") could file its Reply. No Reply was filed by Third Federal and the Court took the matter under advisement on February 24, 2004.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (H) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334(a) and (b).

I. ISSUES

At issue in this case is whether under applicable Ohio law an unrecorded quit claim deed, through which real property was to be transferred from the Debtor to the Defendant pre-petition pursuant to a separation agreement, trumps the Trustee's status as a *bona fide* purchaser ("bfp") at the time of the filing of the petition pursuant to § 544 of the Bankruptcy Code. An additional issue is whether under the Bankruptcy Code the purported transfer is voidable by the Trustee.

What the debtor's interest in the property was at the time of the filing, and therefore what became property of the estate under § 541, is not before the Court.

II. STIPULATIONS

1. The Defendant and the Debtor were married on July 21, 1990.
2. The Defendant and the Debtor acquired real property, identified for mailing purposes as 7526 Sky Haven Road, Northfield Center, Summit County, Ohio, and constructed a residence on the property.

3. On October 8, 2000, the Defendant and the Debtor separated.
4. On May 10, 2002, the Defendant and the Debtor entered into a separation agreement which was subsequently incorporated into a judgment entry of divorce filed for record with the Summit County Clerk of Courts on June 11, 2002.
5. On June 6, 2002, the Debtor executed a quit claim deed to transfer her one-half interest in the real property described above to the Defendant.
6. On June 21, 2002, the Debtor filed her voluntary petition seeking relief under chapter 7 of the Bankruptcy Code.
7. Shortly thereafter Harold A. Corzin was designated by the Office of the U.S. Trustee as the chapter 7 Trustee in the Debtor's case.
8. The schedules filed by the Debtor on June 21, 2002 reflected that she had unsecured liabilities to creditors exceeding \$100,000 and assets totaling ~\$30,000, which included a 2001 Chrysler Sebring having a scheduled current market value of \$17,000 and two pension benefits having a total value of \$8,300.30.
9. On July 16, 2002, the quit claim deed was recorded in the office of John A. Donofrio, fiscal officer for Summit County, Ohio.
10. At the time of the execution of the quit claim deed, the filing of the petition and the date of the recordation of the quit claim deed, the real property was subject to a valid and existing lien, the holder of which was First Merit

Bank in the amount of \$40,000.

III. ANALYSIS

A. Motion for Summary Judgment

A court shall grant a party's motion for summary judgment "if . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), and, upon review, all facts and inferences must be viewed in the light most favorable to the non-moving party. *Searcy* at 285; *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991). A material fact is one that must be decided before there can be a resolution of the substantive issue that is the subject of the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In this case the parties have filed Stipulations which indicate that there is no genuine dispute regarding any material issue in this case, only a dispute as to the application of the Bankruptcy Code and applicable state law to the facts.

A. 11 U.S.C. § 544

Section 544 of the Bankruptcy Code reads in pertinent part:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by -

...

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of commencement of the case, whether or not such purchaser exists.

The Trustee states that at the commencement of the case on June 21, 2002, he acquired the status of a bfp of the Debtor's one-half interest in the real property at mailing address 7526 Sky Haven Road, Northfield Center, Ohio and was entitled to avoid any transfer that was not perfected by the time of the commencement of the case. The Defendant asserts that the separation agreement, divorce decree and the intention of the parties trumped the Trustee's status as a bfp and entitled the Defendant to a transfer of the Debtor's interest in the property.

Pursuant to § 544(a)(3) the "trustee in bankruptcy is given the rights and powers of a bona fide purchaser of real property from the debtor if, at the time the bankruptcy is commenced, a hypothetical buyer could have obtained bona fide purchaser status." *Owen-Ames-Kimball Co. v. Michigan Lithographing Co. (In re Michigan Lithographing Co.)*, 997 F.2d 1158, 1159 (6th Cir. 1993). State law governs who may be a bfp and the rights of such a purchaser for purposes of subsection 544(a)(3). *Id.* However, "the trustee's right as a bona fide purchaser does not override state recording statutes and permit

avoidance of any interest of which a trustee would have had constructive notice under state law.” 5 Collier on Bankruptcy ¶ 544.08 (15th ed. rev. 2000), citing *In re Exchanged Titles, Inc.*, 159 B.R. 303 (Bankr. C.D. Cal. 1993).

Ohio Rev. Code § 5301.25(A) provides, in pertinent part:

All deeds . . . and instruments of writing properly executed for the conveyance or encumbrance of lands . . . shall be recorded in the office of the county recorder of the county in which the premises are situated, and until so recorded or filed for record, they are fraudulent, so far as relates to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of such former deed or land contract or instrument.

A quit claim deed is one of the instruments of writing properly executed for the conveyance of land that must be recorded under Ohio law in order to be valid. If a quit claim deed is not recorded, it is fraudulent as to a subsequent bfp without knowledge of another’s interest pursuant to statute. The deed was not recorded at the time of the commencement of the case and the Trustee had no knowledge of the Defendant’s “interest.” The Defendant does not assert that he recorded the deed prior to the commencement of the chapter 7 case. Rather he asserts that the separation agreement, the divorce decree and the parties intentions effectuated a transfer of the property and gave constructive notice to the Trustee. He concluded, therefore, that the Trustee cannot be a bfp. He does not claim that the divorce decree was recorded in the office of the county recorder prior to the petition date and does not explain how the Trustee would have constructive knowledge of the divorce decree. In addition, the case he cites to support his position, *Anderson v. Conine, et al. (In re Robertson)*, 203 F.3d 855, 865-66 (5th Cir.

2000), actually supports the Trustee's position because in that case the divorce decree had been recorded in the appropriate conveyance records so as to prevent a person from acquiring the status of a bfp under applicable Louisiana law.

The Defendant also asserts that the property was purchased with "premarital monies belonging to Defendant Stephen Gaglione." Response at 5. There is no provision of Ohio law that states that the source of the funds used to purchase a property changes the substantive law requiring the recording of the deed prior to the commencement of the case in order to prevent a trustee from acquiring the rights of a bfp. In declaring that the real property is subject to state law and that the Defendant had to record the deed prior to the filing of the petition in order to prevent the Trustee from attaining bfp status, the bankruptcy Court is not "decid[ing] domestic relations cases and re-tr[ying] them," as the Defendant asserts. Response at 6. Rights of parties to domestic relations actions to determine how property is to be divided are not being abrogated. The Court is simply holding the Defendant to the standard set by the Ohio legislature requiring that he take affirmative action to record the deed in order for it to be valid against a subsequent bfp.

The petition was filed on June 21, 2002, and the deed was not recorded until July 16, 2002, well after the Trustee had acquired the status of a bfp. The recordation is subject to avoidance by the Trustee under this section of the Bankruptcy Code.

B. Sections 549 and 362 of the Bankruptcy Code

Pursuant to § 549 of the Bankruptcy Code a trustee may avoid a transfer of property of the estate -

- (1) that occurs after the commencement of the case; and
- (2) (A) that is authorized only under section 303(f) or 542(c) of this title; or
(B) that is not authorized under this title or by the court.

Since the recordation of the deed was accomplished after the commencement of the case and was not authorized under either § 303(f) or § 542(c) or by this Court, the recordation is subject to avoidance by the Trustee under § 349 of the Bankruptcy Code.

Section 362 of the Bankruptcy Code reads, in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title . . . operates as a stay, applicable to all entities, of-

...

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

The attempted recordation of the deed was an act to obtain possession of property of the estate, *i.e.*, the one-half interest the Debtor had in the property at the commencement of the case. The Sixth Circuit Court of Appeals has stated that acts taken in violation of the automatic stay pursuant to § 362 of the Code are invalid and voidable. *Easley v.*

Pettibone Michigan Corp., 990 F.2d 905 (6th Cir. 1993). In *Easley* the Court held:

Actions taken in violation of the stay are invalid and voidable and shall be voided absent limited equitable circumstances. We suggest that only where the Debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the Debtor is able to raise the stay as a defense, or where the Debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result, will the protections of Section 362(a) be unavailable to the Debtor.

Id. at 911. A willful violation of the automatic stay does not require specific intent. *In re Dunning*, 269 B.R. 357, 362 (Bankr. N.D. Ohio 2001). The term “willful,” while not defined in the Bankruptcy Code, has been interpreted to mean simply acting intentionally and deliberately while knowing of a pending bankruptcy. *See id.* at 373-74; *Cuffee v. Atlantic Business & Community Dev. Corp. (In re Atlantic Business & Community Dev. Corp.)*, 901 F.2d 325, 329 (3rd Cir. 1990).

The Defendant does not assert in any of his pleadings that he was unaware of his former wife’s chapter 7 petition filing just 10 days after the divorce decree was entered. In addition, he did not seek relief from the automatic stay in order to proceed to record the deed. The recordation of the deed is “invalid and voidable” and should be voided absent “limited equitable circumstances” as delineated by the Sixth Circuit in *Easley*. The Defendant has not pointed the Court to any such limited equitable circumstances on which he relies to be relieved of the automatic stay, and such relief is unavailable to him.

IV. CONCLUSION

The purported transfer of the estate’s interest in the property at 7526 Skyhaven Road, Northfield Center, Ohio is subject to avoidance by Harold A. Corzin, acting as Trustee for the estate of Tammy A. Gaglione. It is avoidable both pursuant to § 544 of the Bankruptcy Code, which grants to Trustee the rights and powers of a bfp of real property and the right to avoid a transfer that is voidable by such entity, and pursuant to § 549 of the Bankruptcy Code as an invalid, attempted post-petition transfer of the Debtor’s interest in the real property. In addition, the transfer is invalid and voidable as a

violation of the automatic stay pursuant to § 362.

Based upon the foregoing, **IT IS HEREBY ORDERED:**

1. That the motion for summary judgment filed by Harold A. Corzin, chapter 7 Trustee acting on behalf of the estate of Tammy A. Gaglione, is hereby GRANTED; and
2. That the recordation of the deed is invalid and voidable under the above cited sections of the Bankruptcy Code and the Trustee is entitled to the relief requested as a matter of law.


MARILYN SHEA-STONUM
Bankruptcy Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of June, 2004, the foregoing Order was sent via regular U.S. Mail to:

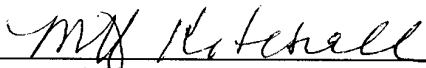
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